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# Eminent Domain--Obsolete Buildings--Proof of Value

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*ardson v. City Trust Co.*, 27 F. (2d) 35 (C. C. A. 7th, 1928) ; while the right to dower is inchoate and does not ripen into an estate or interest until death of the spouse. To allow dower as against a right vested in a third person at the time of marriage would therefore be to make an inchoate right superior to a vested absolute right, prior in time. The instant case does not involve, nor purport to settle, the effect of an antecedent contract on realty acquired by the promisor after his marriage.

D. B. H.

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EMINENT DOMAIN—OBSOLETE BUILDINGS—PROOF OF VALUE.—

The state road commission skillfully and properly performed work of improvement upon land taken by eminent domain for a public road. Resulting slides, however, completely destroyed a vacated hospital building on the unappropriated portion of the land. At the trial in the eminent domain proceeding, the owners introduced evidence over objection showing the reproduction cost of the building at present price levels, less depreciation, but no evidence to show that immediately prior to its destruction the building had any market value or could serve any useful purpose. The court instructed on the reproduction cost theory of recovery and refused the state's requested instructions on the "willing buyer-willing seller" theory of market value specifically calling attention to the long continued disuse of the building. Verdict and judgment for the owner included compensation for the building despite the lack of showing of any current market for it. *Held*, reversible error to permit introduction of evidence as to the reproduction cost, less depreciation, of a building in eminent domain proceedings without a showing of actual value. Judgment reversed and remanded for new trial. *State, by State Road Commission v. Boyd*, 41 S. E. (2d) 665 (W. Va. 1947).

Following the eclectic principle of allowing the jury in eminent domain proceedings to consider a wide range of evidence connected with value and in sustaining verdicts based on such a composite showing, West Virginia has specifically approved consideration of reproduction cost less depreciation as bearing on valuation of property in eminent domain proceedings. *Baltimore & O. R. R. v. Bonafield*, 79 W. Va. 287, 90 S. E. 868 (1916) ; *cf. Hearn v. McDonald*, 69 W. Va. 435, 71 S. E. 568 (1911). The general practice is of course to regard fair market value as the test determining proper valuation for compensation purposes, *Tennessee Valley Authority*

*v. Powelson*, 118 F. (2d) 79 (C. C. A. 4th, 1941); *Chicago v. Farwell*, 286 Ill. 415, 121 N. E. 795 (1918); *Sparkill Realty Corp. v. State*, 268 N. Y. 192, 197 N. E. 192 (1935); *Charles v. Big Sandy & C. Ry.*, 142 Va. 512, 129 S. E. 384 (1925), and the rule in this state does not purport to adopt a different test but to accept evidence of reproduction cost as bearing on it. *Baltimore & O. R. R. v. Bonafield*, *supra* at 295, 296. On the general principle, that "when there is no market value, the value must be got at by the best proof to be had," 1 SEDGWICK, DAMAGES 491 (9th ed. 1913), proof of reproduction cost has been allowed to establish measure of damages in tort actions for conversion, *Allis-Chalmers Mfg. Co. v. Board*, 118 S. W. (2d) 996 (Tex. Civ. App. 1933) and negligent injury to chattels, *International-Great Northern Ry. v. Casey*, 46 S. W. (2d) 669 (Tex. Comm. App. 1932). To determine the value of a large produce market, a unique property returning substantial revenues, it has been held, on appraising it under a special eminent domain statute thought to preclude consideration of certain other evidence, that the only "just and legal" method of arriving at the fair value of the property to be taken was the cost of reproduction based upon present values, less depreciation. *In re United States Commission to Appraise Washington Market Co. Property*, 295 F. 950 (App. D. C. 1927). In all these situations, however, the property evaluated was concededly of some value, the only problem being to choose a method of measuring that value. If no market value of the property is shown and no rental value, it has been held, in suits for negligent destruction of abandoned structures of special design, a judgment measured only by reproduction cost without regard to location or available uses could not be sustained, *Olds v. Von Der Hellen*, 127 Ore. 276, 263 Pac. 907 (1928) (depot), and that admitting evidence bearing on reproduction cost was reversible error. *Chicago & N. W. Ry. v. Davis*, 78 Ill. App. 58 (1898) (tumble-down icehouse). In extending to eminent domain proceedings the principles applied in these tort cases and not following the lead given by *Matter of the City of New York*, 265 N. Y. 170, 192 N. E. 188 (1934), allowing recovery in eminent domain proceedings for the cost of unsalable easements of light and air, the court has acted wisely. Indeed, should occasion arise, it might be well to go further and re-examine our doctrine allowing proof of reproduction cost in eminent domain proceedings as evidence of value of structures having some value, cf. 1 BONBRIGHT, VALUATION OF PROPERTY (1937) 429. On the re-

trial it should be remembered that a demand for a possible special use need not necessarily be shown before the jury can consider it as indicative of worth. *Illinois Light & Power Co. v. Bedard*, 343 Ill. 618, 175 N. E. 851 (1931). And property should not be deemed worthless, as respects compensation of the owner in eminent domain proceedings, merely because he allows it to go to waste or is unable to put it to any use, *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403 (1878).

J. W. B.

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EVIDENCE—HEARSAY—SPONTANEOUS EXCLAMATION.—Plaintiff was injured when struck by a truck driven by an employee of defendant. In an action to recover damages for personal injury, witnesses were permitted "on the theory that it was part of the *res gestae*" to testify over objection that they heard a fellow employee of the driver who was in the truck with him say, immediately following the accident, that he told the driver just *before* the accident that he was driving too fast. After verdict and judgment for plaintiff, admission of such statement in evidence was assigned as error. *Held*, not error to admit the statement. Judgment affirmed. *Jones v. Ambrose*, 38 S. E. (2d) 263 (W. Va. 1946).

The subject of *res gestae* is in theory simple. Every circumstance or declaration which grows out of the main transaction, is contemporaneous with it, and serves to illustrate its character, is admissible. *Cf. State v. Prater*, 52 W. Va. 122, 43 S. E. 230 (1902); *Sample v. Consolidated etc. Co.*, 50 W. Va. 472, 40 S. E. 597 (1901). Relevant circumstances not consisting of statements may usually be proven, but when accompanying utterances are offered to prove the truth of the facts asserted, a more difficult problem is presented. By the orthodox view, hearsay statements are admissible as part of the *res gestae* if (1) there is some nonverbal act that is itself admissible under the issue, (2) the statements characterize or explain the act and (3) the statements and the act accompany each other, *i. e.* are contemporaneous. *Sample v. Consolidated, etc., Co.*, 50 W. Va. 472, 40 S. E. 597 (1901); Hardman, *Spontaneous Exclamation v. Res Gestae* (1918) 25 W. VA. L. Q. 341. Declarations merely narrative of a past occurrence, though made ever so soon after the event, cannot be received as proof of the event since they are not contemporaneous with the main transaction. *Hawker v. Baltimore & Ohio P. R.*, 15 W. Va. 628 (1879); *Corder v. Talbot*, 14 W. Va. 277